A

Kumaran Suppiah v Dato' Noh bin Haji Omar & Anor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–38 OF 2006(J)

B AHMAD FAIRUZ CHIEF JUSTICE, ALAUDDIN AND AUGUSTINE PAUL FCJJ

22 SEPTEMBER 2006

C *Preventive detention — Detention order — Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 — No explanation for the delay in the date of commencement of the order — Order made to take effect on a date subsequent to the date it was made — Whether explanation of such delay a condition precedent to the making of detention order — Whether the need for such explanation a procedural requirement subject to judicial review*

D

Preventive detention — Detention order — Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Order made to take effect on a date subsequent to the date it was made — No explanation for the delay in the date of

E *commencement of the order — Whether order invalid*

The appellant was ordered to be detained for a period of two years with effect from 26 December 2004, pursuant to a detention order under s 4(1) of the Emergency

F (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') on 17 December 2004. He filed a writ of habeas corpus in the High Court to secure his release. The application was refused and he appealed to the Federal Court. Counsel argued that the detention order was invalid as it had been made to take effect (from 26 December 2004) on a date subsequent to the date on which it was made

G (17 December 2004).

Held, allowing the appeal

(1) The language of s 4(1) of the Ordinance is clear in its intent and purport.

H There is no indication, expressly or by implication, that the date of commencement of the detention order must be the same as the date of making it. The section is silent on this requirement. It is a rule of construction that where the terms of an enactment are clear, precise and unambiguous it must be applied and enforced according to its plain meaning. It is not the function of the court to speculate as to what might have been in the mind of the

I enacting authority as it may appear to the court from the preamble or otherwise (see para 6); *Badri Prasad v Ram Narain Singh* AIR 1939 All 157 and *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor and another appeal* [1990] 1 MLJ 171 referred.

(2) The fact that s 4(1) of the Ordinance is silent with regard to the time within which the detention order must be made to take effect does not mean that the Minister has a complete discretion in determining the date. Where no time has been prescribed for the doing of an act in a statutory provision it must be read with s 54(2) of the Interpretation Act 1967 ('s 54(2)') which, inter alia, provides for the act to be done with 'all convenient speed' (see para 7).

(3) What constitutes 'all convenient speed' depends upon the facts and peculiar circumstances of each case. As s 4(1) of the Ordinance read with s 54(2) deals with preventive detention it must be strictly construed. Thus, the requirement as to the time within which a detention order must be made to take effect must be the same or as close as possible to the date of making of the detention order. Where both the dates do not coincide the delay must be explained. The necessity for such an explanation must therefore be read as a constituent part of s 4(1) of the Ordinance (see para 8); *Tai Choi Yu v Government of Malaysia & Ors* [1994] 1 MLJ 677; *Ex parte Austco Pty Ltd* [1985] 2 QD R 1; *Bidya Deb Barma v District Magistrate, Tripura* AIR 1969 SC 323; *SK Salim v The State of West Bengal* AIR 1975 SC 602; *R v Inspector of Taxes, Ex parte Clarke* [1971] 3 WLR 425; *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 referred.

(4) A failure to provide any reason to explain the delay in the effective date of a detention order will mean that there has been a breach of s 4(1) of the Ordinance. As the detention order in this case was made on 17 December 2004, its date of commencement on 26 December 2004 could not be said to have been done with all convenient speed. Thus, the respondents had to show that the delay in the date of commencement of the detention order had been explained. However, the respondents failed to explain the delay and there was therefore a breach of s 4(1) of the Ordinance (see paras 9, 11).

(5) The decision to detain a person for a specified period under s 4(1) of the Ordinance is a matter dealing with the discretion of the Minister and cannot be subject to judicial review pursuant to s 7C(1) of the Ordinance. Similarly, the making of a detention order with a delayed date of commencement is a decision made by the Minister in the exercise of his discretion and thus cannot be subject to judicial review. However, the need to explain a delay in the date of commencement of a detention order is a constituent part of s 4(1) of the Ordinance and is a condition precedent to the making of a detention order in such a situation. Since it is a condition precedent to the making of the decision by the Minister to have a delayed date of commencement of the detention order, it is a procedural requirement governing such decision and thus subject to judicial review. In the instant case, no explanation had been offered for the delay in the commencement of the detention order. This amounted to non-compliance with a procedural requirement governing the making of the detention order. The order was therefore invalid (see para 15).

[Bahasa Malaysia summary

Perayu telah diperintahkan untuk ditahan selama dua tahun bermula 26 Disember 2004, menurut perintah penahanan di bawah s 4(1) Ordinan Darurat (Ketenteraman

Awam dan Pencegahan Jenayah) 1969 ('Ordinan tersebut') pada 17 Disember 2004. Beliau telah memfailkan satu writ habeas corpus di Mahkamah Tinggi untuk menjamin pembebasannya. Permohonan itu telah ditolak dan beliau telah merayu ke Mahkamah Persekutuan. Peguam berhujah bahawa perintah penahanan itu tidak sah kerana ia dibuat untuk berkuatkuasa (daripada 26 Disember 2004) pada suatu tarikh berikutan tarikh di mana ia dibuat (17 Disember 2004).

Diputuskan, membenarkan rayuan tersebut:

(1) Ungkapan s 4(1) Ordinan tersebut adalah jelas akan tujuan dan maksudnya. Tiada tanda, secara nyata atau tersirat, bahawa tarikh bermulanya perintah penahanan perlulah sama dengan tarikh ia dibuat. Seksyen itu tidak menyatakan tentang keperluan ini. Ia adalah rukun pembentukan bahawa di mana terma-terma sebuah enakmen adalah jelas, tepat dan tidak taksa, ia perlulah digunakan dan dikuatkuasa menurut maksud biasanya. Ia bukan fungsi mahkamah untuk membuat spekulasi tentang apa yang mungkin berlegar dalam pemikiran pihak berkuasa yang menggubal seperti mana yang kelihatan di mahkamah berdasarkan mukadimah itu atau sebaliknya (lihat perenggan 6); *Badri Prasad v Ram Narain Singh* AIR 1939 All 157 dan *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor and another appeal* [1990] 1 MLJ 171 dirujuk.

(2) Fakta bahawa s 4(1) Ordinan tersebut tidak menyatakan tentang tempoh masa di mana perintah penahanan perlu dibuat agar berkuatkuasa tidak bermaksud bahawa Menteri mempunyai budi bicara sepenuhnya menentukan tarikh. Di mana tiada tempoh masa ditetapkan untuk melakukan suatu tindakan dalam peruntukan statutori, ia perlu dibaca bersama s 54(2) Akta Tafsiran 1948 dan 1967 ('s 54(2)') yang, antar lain, memperuntukkan untuk tindakan dilakukan dengan 'all convenient speed' (lihat perenggan 7).

(3) Apa yang membentuk 'all convenient speed' bergantung kepada fakta-fakta dan keadaan khusus setiap kes. Memandangkan s 4(1) Ordinan tersebut dibaca dengan s 54(2) adalah berhubung penahanan pencegahan, ia perlu dipatuhi dengan ketat. Oleh itu, keperluan berhubung tempoh masa di mana suatu perintah penahanan perlu dibuat agar berkuatkuasa hendaklah sama atau dekat dengan tarikh perintah tahanan itu dibuat. Di mana kedua-dua tarikh tidak sama, kelewatan itu boleh dijelaskan. Keperluan untuk satu penjelasan hendaklah dibaca sebagai sebahagian daripada s 4(1) Ordinan tersebut (lihat perenggan 8); *Tai Choi Yu v Government of Malaysia & Ors* [1994] 1 MLJ 677; *Ex parte Austco Pty Ltd* [1985] 2 QD R 1; *Bidya Deb Barma v District Magistrate, Tripura* AIR 1969 SC 323; *SK Salim v The State of West Bengal* AIR 1975 SC 602; *R v Inspector of Taxes, Ex parte Clarke* [1971] 3 WLR 425; *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 dirujuk.

(4) Kegagalan untuk memberikan apa-apa sebab untuk menjelaskan tentang kelewatan itu pada hari kuatkuasa satu perintah tahanan bermaksud telah berlaku pelanggaran s 4(1) Ordinan tersebut. Memandangkan perintah tahanan dalam kes ini dibuat pada 17 Disember 2004, tarikh mulanya pada 26 Disember 2004 tidak boleh dikatakan telah dilaksanakan dengan segera. Oleh itu, responden-responden telah menunjukkan bahawa kelewatan dalam

tarikh mulanya perintah tahanan telahpun dijelaskan. Namun, responden-responden gagal untuk menjelaskan kelewatan itu dan oleh demikian terdapat pelanggaran s 4(1) Ordinan tersebut (lihat perenggan 9, 11).

(5) Keputusan untuk menahan seseorang untuk satu tempoh yang ditetapkan di bawah s 4(1) Ordinan tersebut merupakan satu perkara yang berkaitan budi bicara Menteri dan tidak tertakluk kepada semakan kehakiman menurut s 7C(1) Ordinan tersebut. Begitu juga dalam membuat perintah tahanan dengan tarikh permulaan yang lebih lewat adalah satu keputusan yang dibuat oleh Menteri dalam menggunakan budi bicaranya dan oleh itu tidak boleh tertakluk kepada semakan kehakiman. Bagaimanapun, keperluan untuk menjelaskan satu kelewatan dalam tarikh permulaan satu perintah tahanan merupakan sebahagian konstituen s 4(1) Ordinan tersebut dan merupakan pra syarat membuat satu perintah tahanan dalam keadaan sedemikian. Memandangkan ia adalah satu pra syarat untuk membuat keputusan oleh Menteri untuk memberikan tarikh permulaan yang lebih lewat, ia adalah satu keperluan prosedur yang mengawal keputusan sedemikian dan oleh itu tertakluk kepada semakan kehakiman. Dalam kes semasa, tiada penjelasan telah diberikan untuk kelewatan memulakan perintah tahanan itu. Ini membentuk ketidakpatuhan dengan keperluan prosedur yang mengawal pembuatan perintah tahanan. Perintah tersebut dengan itu adalah tidak sah (lihat perenggan 15).]

Notes

For cases on Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1304–1315.

Cases referred to

Application of Tan Boon Liat @ Allen, Re; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83 (refd)

Badri Prasad v Ram Narain Singh AIR 1939 All 157 (refd)

Bidya Deb Barma v District Magistrate, Tripura AIR 1969 SC 323 (refd)

Datuk James Wong Kim Min, Re [1976] 2 MLJ 245 (refd)

Ex parte Austco Pty Ltd [1985] 2 QD R 1 (refd)

Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals [2003] 1 MLJ 321 (refd)

R v Inspector of Taxes, Ex parte Clarke [1971] 3 WLR 425 (refd)

Reverend Thomas Pelhma Dales' case, The (1881) 6 QBD (refd)

SK Salim v The State of West Bengal AIR 1975 SC 602 (refd)

Tai Choi Yu v Government of Malaysia & Ors [1994] 1 MLJ 677 (refd)

Tan Boon Liat @ Allen & Anor, Re; Tan Boon Liat & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors [1977] 2 MLJ 108 (refd)

Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor and another appeal [1990] 1 MLJ 171 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 s 11C(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 4(1), 7C(1) Interpretation Acts 1948 and 1967 s 54(2)

Appeal from: Criminal Application No MT3–44–64 of 2005 (High Court, Johor Bahru)

Gobind Singh Deo (Karpal Singh & Co) for the appellant.
Najib Zakaria (Legal Adviser's Office, Ministry of Internal Security) for the respondents.

Augustine Paul FCJ (delivering judgment of the court):

[1] The only issue for determination in this appeal is whether a detention order made under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') can be made to take effect on a date subsequent to the date on which it was made. The appellant was ordered to be detained for a period of two years with effect from 26 December 2004 pursuant to a detention order made under s 4(1) of the Ordinance on 17 December 2004. He filed a writ of habeas corpus in the High Court to secure his release. The application was refused and this appeal is by him.

[2] Before us, learned counsel argued that the detention order is invalid as it has been made to take effect on a date subsequent to the date on which it was made. He said that it must be made to take effect from the date it was made. This, he said, is clear from the language of s 4(1) of the Ordinance which reads as follows:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that person be detained for any period not exceeding two years.

[3] Learned counsel contended that the period of detention must commence on the date when the Minister is satisfied of the need to make a detention order. In his submission, the learned Deputy Public Prosecutor said that there is nothing in s 4(1) of the Act to indicate the date of commencement of the detention order. In support, he referred to the judgment of the (then) Supreme Court in *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor and another appeal* [1990] 1 MLJ 171 where Hashim Yeop Sani CJ (Malaya) said at pp 171–172:

> The power of the Minister to make a detention order under the Act is conferred by s 6(1) of the Act. The power under s 6(1) of the Act is expressly stated in the following terms, that is to say that whenever the Minister after considering the report of investigation and the report of the inquiry officer is satisfied that a person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he

is satisfied that it is necessary in the interest of public order that such person be detained, by order 'direct that such person be detained for a period not exceeding two years from the date of such order'. (Emphasis added.)

The Act was passed by Parliament in 1985. Prior to the passing of the Act, there were similar statutory powers of preventive detention in existence, namely, the respective provisions in the Internal Security Act 1960 and the Emergency (Public Order and Prevention of Crime) Ordinance 1969.

In s 8(1) of the Internal Security Act 1960, the power to order detention or restriction of persons is expressed in the following terms, that is to say that if the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services or to the economic life of Malaysia, he may make a detention order 'directing that that person be detained for any period not exceeding two years'. (Emphasis added.)

In the Emergency (Public Order and Prevention of Crime) Ordinance 1969, there is a similar power of detention contained in s 4(1) thereof where if the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order 'directing that that person be detained for any period not exceeding two years. (Emphasis added.)

It can be seen very clearly that the later law, that is the Act (of 1985), deviated from the previous two legislations on how the period of two years of detention shall be calculated.

The addition of the words 'from the date of such order' must bear some significant meaning. It is clear from those words that the material date for the commencement of the detention is the date when the order is made and signed by the Minister. On this construction, the period of two years must be calculated from the date that the order was made and signed by the Minister and not any other date.

It is not permissible under s 6(1) of the Act for the Minister to specify a different date from the date of the order for the commencement of the detention unlike in the case of the previous two legislations where the Minister may from the language of the relevant provisions direct that a person be detained for a period not exceeding two years from a date as may be specified by the Minister.

In other words, the words 'from the date of such order' in s 6(1) of the Act must mean what they say, that is from the date that the order is made and signed.

It is to be observed that the legislature did not use words like 'from the date in such order' or 'from the date as may be specified in such order' for that would have given the power to the Minister to specify a different date from the date of the order. (Emphasis added.) The statute may even be silent on the date of commencement as in the case of the two other legislations referred to earlier.

[4] This passage was adopted by this court in *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* [2003] 1 MLJ 321. The learned Deputy Public Prosecutor then referred to the preamble to the Act which reads as follows:

AND WHEREAS the Yang di-Pertuan Agong is satisfied that immediate action is required for securing public order, the suppression of violence and the prevention of crimes involving violence;

[5] He then referred to *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83 where it was held that when the enacting part of a statute is explicit and unambiguous the preamble cannot be resorted to in order to control, qualify or restrict it. Thus, he said, as s 4(1) of the Ordinance is clear in its meaning the preamble cannot be resorted to in the interpretation of the section.

[6] In our view, the language of s 4(1) of the Ordinance is clear in its intent and purport. In substance, it states that when the Minister is satisfied of the existence of the conditions enumerated therein he shall make a detention order directing that the person be detained for any period not exceeding two years. There is no indication, expressly or by implication, that the date of commencement of the detention order must be the same as the date of making it. The section is silent on this requirement as observed by the (then) Supreme Court in *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171. It is a rule of construction that where the terms of an enactment are clear, precise and unambiguous it must be applied and enforced according to its plain meaning and it is not the function of the court to speculate as to what might have been in the mind of the enacting authority as it may appear to the court from the preamble or otherwise (see *Badri Prasad v Ram Narain Singh* AIR 1939 All 157).

[7] The fact that s 4(1) of the Ordinance is silent with regard to the time within which the detention order must be made to take effect does not mean that the Minister has a complete discretion in determining the date. Where no time has been prescribed for the doing of an act in a statutory provision it must be read with s 54(2) of the Interpretation Acts 1948 and 1967 ('s 54(2)') which reads as follows:

> Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.

[8] In cases such as *Tai Choi Yu v Government of Malaysia & Ors* [1994] 1 MLJ 677 and *Ex parte Austco Pty Ltd* [1985] 2 QD R 1, it was observed that what will be 'all convenient speed' will depend upon the facts and peculiar circumstances of each case. As s 4(1) of the Ordinance read with s 54(2) deals with preventive detention it must be strictly construed. Thus, the requirement as to the time within which a detention order must be made to take effect must be the same or as close as possible to the date of making of the detention order. Where both the dates do not coincide the delay must be explained. This is in line with the rule that any delay in a matter that must be done within a reasonable time must be satisfactorily explained (see *Bidya Deb Barma v District Magistrate, Tripura* AIR 1969 SC 323; *SK Salim v The State of West Bengal* AIR 1975 SC 602; *R v Inspector of Taxes, Ex parte Clarke* [1971] 3 WLR 425). The necessity for such an explanation must therefore be read as a constituent part of s 4(1) of the Ordinance. In commenting on the need to comply with statutory requirements in cases of preventive detention, Lee Hun Hoe CJ (Borneo) said in *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 at p 251:

> Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty

of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184.

One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject. In fact, art 5(1) of the Constitution guarantees that 'no person shall be deprived of his … liberty except in accordance with the law.' If this constitutional guarantee is to have any real meaning at all, then it is imperative that the courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law.

[9] The case of *The Reverend Thomas Pelhma Dales' case* (1881) 6 QBD cited in *Re Tan Boon Liat @ Allen & Anor; Tan Boon Liat & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108, makes it clear that the steps taken to detain a person must be entirely regular. Thus, where there is a delay in the date of commencement of a detention order, the requirement of an explanation for the delay must have been complied with. A failure to provide any reason to explain the delay in the effective date of a detention order will thus mean that there has been a breach of s 4(1) of the Ordinance. As the detention order in this case was made on 17 December 2004, its date of commencement on 26 December 2004 cannot be said to have been done with all convenient speed. Thus, the respondents must show that the delay in the date of commencement of the detention order has been explained.

[10] None of the affidavits affirmed by the respondents contain any explanation for the delay. The Deputy Minister of Internal Security made an attempt to do so in paragraph 8 of his affidavit. It reads as follows:

Merujuk kepada afidavit pemohon saya ingin menegaskan bahawa penahanan pemohon yang bertarikh diantara 17 December 2004 hingga 26 December 2004 adalah sah kerana ia mematuhi peraturan di bawah Akta tersebut.

[11] This is only an explanation for the detention of the appellant from 17 December 2004 to 26 December 2004. It does not, however, explain why the detention order was made to take effect from 26 December 2004. This is particularly significant as the fact that the detention order has been made can only mean that inquiries into the activities of the appellant have been completed and the legality of his continued detention thereafter is questionable. The respondents have therefore failed to explain the delay in the date of commencement of the detention order. This is a breach of s 4(1) of the Ordinance.

[12] The resultant matter for consideration is whether the breach of s 4(1) of the Ordinance in failing to explain the delay is one that is subject to judicial review. The scope of judicial review under the Ordinance is governed by s 7C(1) which reads as follows:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Ordinance, save in regard to any question on compliance with any procedural requirement in this Ordinance governing such act or decision.

[13] This section is in pari materia with s 11C(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 which was considered by this court in *Muhammad Jailani bin Kasim v Timbalan Menteri Dalam Negeri, Malaysia & Ors* (Federal Court Criminal Appeal No 05–34 of 2006 (J)) in the following words:

> The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 3 MLJ 2 8; *Low Teng Hai v Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v Inspector General of Police* [1993] 1 MLJ 65. It has been recognised in these cases that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee. However it must be observed that the power of the court to intervene is limited to only matters of compliance with procedural requirements by s 11C(1) of the Act which reads as follows:
>
> > There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. Such procedural requirements can only be ones that will go to the root of the matter and be of direct relevance to the making of the detention order. The section only refers to a question of compliance with procedural requirements without subjecting it to any prejudice having been suffered. The test, therefore, in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, though not decisively, by a consideration of the effect of the statutory provision that has been breached, that is to say, whether it is mandatory or directory in nature.

[14] This passage was adopted by this court in *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Ong Beng Chuan* (Federal Court Criminal Appeal No 05–19 of 2006 (J)).

[15] The decision to detain a person for a specified period under s 4(1) of the Ordinance is, without any doubt, a matter dealing with the discretion of the Minister and so it cannot be subject to judicial review pursuant to s 7C(1) of the Ordinance. Similarly, the making of a detention order with a delayed date of commencement is again a decision made by the Minister in the exercise of his discretion and thus cannot be subject to judicial review. However, as stated earlier, the need to explain a delay in the date of commencement of a detention order is a constituent part of s 4(1) of the Ordinance. It is a condition precedent to the making of a detention order in such a situation. There must therefore be in existence an explanation in such cases before the making of the detention order. It must be observed that the sufficiency of the explanation cannot be the subject of judicial inquiry as it is a matter within the discretion of the Minister. That, however, cannot be said of the availability of the explanation itself at the time of the making of the detention order. As the explanation is not the decision itself but only a part of the decision making process, it is a matter of procedure, and, a very significant one. Since it is a condition precedent to the making of the decision by the Minister to have a delayed date of commencement of the detention order, it is a procedural requirement governing such decision. The question of whether this requirement has been complied with is thus subject to judicial review. As explained earlier no explanation has been offered in this case for the delay in the commencement of the detention order. This amounts to non-compliance with a procedural requirement governing the making of the detention order. The order is therefore invalid.

[16] Accordingly, we allow the appeal.

Appeal allowed.

Reported by John Paul Simon